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Ida M. Johnson v. Arthur Hardman : Brief of Defendant and Appellant Arthur Hardman

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

IDA M. JOHNSON, Administra-
trix of the estate of C. Tennyson
Johnson, Deceased.

Plaintiff and Respondent,

vs.

ARTHUR HARDMAN, dba
HARDMAN AUTO SALES,
NATHAN CHILD and
BARRUS MOTOR COMPANY,

Defendant and Appellant.

Clerk, Supreme Court

No. 8647

BRIEF OF DEFENDANT AND APPELLANT
ARTHUR HARDMAN

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Appellant Arthur Hardman*

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PRELIMINARY STATEMENT

On December 20, 1955, Nathan Child was driving a 1951 International Pickup Truck east on Highway 40, approximately 10 miles west of Salt

Lake City when the vehicle suddenly veered from the south center of the highway to the north side, where it collided with an automobile driven by one George Williams, in which C. Tennyson Johnson was riding, resulting in fatal injuries to him. The plaintiff as the administratrix of his estate brought an action to recover damages against Nathan Child, Arthur Hardman, dba Hardman Auto Sales and Barrus Motor Company. The suit was brought against Hardman as a defendant on the theory that Child was his servant or agent and against Barrus Motor Company on the theory that the steering apparatus and the wheels of the vehicle were in a defective condition, which the Barrus Motor Company knew or should have known.

The allegations of negligence were denied by all three defendants. Hardman also denied that Child was his agent or servant.

At the close of the evidence the court, upon motion, dismissed the Barrus Motor Company from the action. The jury returned a verdict in favor of the plaintiff and against the defendants Hardman and Child in the sum of \$43,628.23.

This appeal is taken by the defendant Hardman upon the grounds that there was no evidence to submit to the jury on the issue of whether Child was his servant or agent and that his motion for

a directed verdict of no cause of action should have been granted. He also contends that the court erroneously gave certain instructions and refused to give others.

STATEMENT OF FACTS

The defendant Hardman is a resident of Sunset, Utah, where he operated a garage and a used car lot (R. 35). The defendant Child had known Hardman for some time before December 20, 1955 (the date of the accident). They were friends and Child had purchased cars from him in the past. Sometime before the date of the accident Child told Hardman that he was interested in buying a used pickup truck. (R. 26). Sometime after, Hardman informed Child that he thought he had located a pickup in Tooele, Utah, which might interest him and arrangements were made for Child to accompany Hardman on the trip to Tooele in order that he could see the vehicle (R. 26). They drove from Sunset to Tooele in Hardman's wrecker truck (R. 21). Hardman did not pay Child to make the trip, nor did Child pay any of the trip expense (R. 26).

The pickup truck was an International '51. It looked "pretty good" to Child. They took the truck on a test run, observed that there were some defects, consisting of broken glass and the oil pump and speedometer were not functioning properly (R. 27). Child told Hardman if these defects were

repaired, he would buy the truck (R. 28). The repairs were made to Child's satisfaction and he told Hardman he would accept it (R. 28 and 40). The Agreed purchase price before they left Tooele was \$650.00 (R. 30, 40), of which Child intended to pay Hardman \$500.00 when he returned to Sunset, plus the trade-in value of a 1941 Ford, that Hardman would give Child credit for the \$150.00 balance which he would pay in about ninety days (R. 30). In the course of this conversation Hardman told Child that he would not pay Barrus Motor Company for the car unless he (Child) would take it as he didn't want it in his stock (R. 27, 31, 40). Hardman paid Barrus Motor Company \$600.00 for the pickup, received the Certificate of Title from them but not the registration certificate (R. 36, 41-42). In addition, there may have been a Bill of Sale or other papers. Hardman delivered none of these documents to Child. It was Hardman's understanding that the transaction was completed verbally except the paper work, which would be done when they returned to Sunset (R. 31, 41). Hardman placed his dealer's license plates on the truck.

On cross-examination by counsel, Hardman testified that he did not intend to transfer the title to Child until they got home (R. 37). However, his subsequent testimony clearly establishes that by "title" he meant a document or piece of paper as distin-

guished from the property interest in the truck (R. 38, 46, 48).

Hardman intended to take Child's note for the \$150.00 balance due on the purchase price (R. 44-47).

Child drove the truck on the return trip from Tooele. Hardman suggested they pass each other occasionally (R. 32), which was the extent of the conversation between Hardman and Child concerning the latter's operation of the truck (R. 32). Shortly after leaving Tooele Hardman stopped his vehicle. Child pulled up behind him and also stopped (R. 34). No signals or directions were given by Hardman to Child either before or after making this stop (R. 34). After resuming the trip the collision occurred approximately one and one-half miles west of the Morton Salt Plant on U.S. Highway 40.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE ESTABLISHES AS A MATTER OF LAW THAT THE DEFENDANT NATHAN CHILD WAS NOT DRIVING SAID PICKUP TRUCK AT THE TIME OF THE ACCIDENT AS THE AGENT OR SERVANT OF THE DEFENDANT ARTHUR HARDMAN.

POINT II.

THE COURT ERRED IN ITS INSTRUCTIONS ON THE LAW AND BY FAILING TO SUBMIT TO THE JURY THE DEFENDANT HARDMAN'S THEORY OF THE CASE.

ARGUMENT

POINT I.

THE EVIDENCE ESTABLISHES AS A MATTER OF LAW THAT THE DEFENDANT NATHAN CHILD WAS NOT DRIVING SAID PICKUP TRUCK AT THE TIME OF THE ACCIDENT AS THE AGENT OR SERVANT OF THE DEFENDANT ARTHUR HARDMAN.

This case arose out of the same accident as that of Walter Anderson vs. Arthur Hardman, dba Hardman Auto Sales, Nathan Child and Barrus Motor Company, No. 8580, now pending on appeal in this Court. The evidence in each case on the question of agency or the right of Hardman to control Child in the operation of the pickup differed only in that in this case there was more detailed testimony from Hardman as to his intentions with respect to taking Child's note for the balance of the purchase price (R. 44-49), which supports the appellant's contention that the ownership of the pickup had passed from Hardman to Child before they left Tooele on the return trip to Sunset.

Section 41-1-72, *Utah Code Annotated 1953*, provides that title to an automobile shall be deemed not to have passed until the title is transferred in accordance with the requirements of the Motor Vehicle Law. However, the decision of *Jackson vs. James*, 97 Utah 41, 89 P. 2d 235, held that as between the parties themselves compliance with the statute was unnecessary to transfer ownership. This

decision was reaffirmed in *Heaston v. Martinez*, 3 Utah 2d 259, 282 P. 2d 833, where this Court again recognized that delivery of the Certificate of Title properly endorsed was not essential to a valid sale of an automobile.

As stated in the *Jackson v. James* opinion, *supra*:

“Section 69 provides for transfer of registration in certain cases by affidavit. It seems therefore that Section 71 is not to be construed, as contended by appellant, as absolute and mandatory to pass a title. In the light of the whole chapter, it is evident that its provisions were written to protect innocent purchasers and third parties from fraud, but was not intended to be controlling as between the parties to the transaction. It may well be doubted that the Legislature could make mandatory any such formalities as a prerequisite to transfer of title as between the parties. It can, of course, prescribe such rules to be effective as to third parties and it may perhaps provide that the registered title shall be an element in determining liability for damages resulting from the operation of the car, as indicated by Section 76.

“Let us now devote a few minutes to a more particular analysis of Section 71, the section upon which appellant relies. It will be noted from the italicized portion of the section quoted, *supra*, that the title shall be deemed to be incomplete. These provisions are not absolute, mandatory or controlling in their application. They do not confer or deny

substantive rights. They are procedural or evidentiary in nature. They provide a flag of warning to prospective transferees or encumbrancers, much as do the registry acts relative to real estate or chattel mortgages. Such was the effect given the statute in *Schwartz v. White*, 80 Utah 150, 30 P. (2) 643."

Does the fact that Child was involved in an accident out of which arose plaintiff's claim for damages against him and Hardman change the situation so that ownership in the vehicle would not pass between them but would pass if plaintiff's claim did not exist? The same principles apply to the sale of an automobile as to any other personal property, irrespective of what happens to the vehicle after the transaction has occurred. This pickup was a specific piece of property. The automobile was in a deliverable state. The repairs requested by Child had been made (R. 28). The purchase price had been agreed on (R. 30 and 40). Hardman would not have paid Barrus Motor Company for the truck unless assured by Child that he would take it (R. 27 and 31-32). Hardman's reluctance to pay for the truck unless Child accepted it beforehand is borne out by the fact that the vehicle Hardman did take from Barrus and was towing to Sunset when the accident happened was on consignment (R. 41). If the mutual understanding of Hardman and Child had not been that Child had purchased

the truck, would not Hardman have also taken possession of the pickup under consignment? The Uniform Sales Act adopted by Utah, Sections 60-2-2 and 60-2-3, *Utah Code Annotated 1953*, relating to transfer of property and title, apply to this situation:

“60-2-2. Property and specific goods passes when parties so intend. (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

“(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usage of trade and the circumstances of the case.

“60-2-3. *Rules for ascertaining intention.*— Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property and the goods is to pass to the buyer;

“Rule (1) Where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, is postponed.

“Rule (4) * * *

(b) Where in pursuance of a contract to sell the seller delivers the goods to the buyer,

or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in cases provided for in the next rule and in Section 60-2-4. (Rule 5 and Section 60-2-4 not applicable).* * *

In *Jones v. C. I. Trust*, 64 Utah 151, 228 P. 896, it was held that title to a new vehicle passed to the purchaser upon the happening of a condition subsequent. That is, the sale of the old car for \$1,500.00 by the dealer, to apply upon the purchase price. This Court clearly states the principle as follows:

“A sale involves a present transfer of the title in the goods from the seller to the buyer. A contract to sell implies that the title in the goods remains vested in the seller and is to be transferred to the buyer at some future time. Whether a contract is one of sale or an executory contract to sell depends always upon what the parties to it intend in regard to the time when the title in the property is to go to the buyer. If they intend the title to be transferred when the contract is made, it is a contract of sale; otherwise it is a contract to sell. The intention of the parties is the important and controlling fact to be considered and given effect in determining the nature of a contract in this regard. There may be a sale, a present passing of the title, notwithstanding that by the terms of the agreement the right to the possession of the thing sold is retained by the seller until the

purchase price is paid. The intention must be determined from a consideration of the nature and terms of the contract, usages of trade, the conduct of the parties and the circumstances of the case. *If no contrary intention appears from such a consideration, then the law presumes, where the contract pertains to a specific chattel, in a deliverable state, that the parties intend the title to pass when the contract is made, and this is true regardless of the fact that payment of the price or delivery of the goods, or both, be postponed.*

The foregoing propositions are elementary. They are to be found in the provisions of the Uniform Sales Act, Comp. Laws of Utah, 1917, ss. 5110, 5127, 5128, Rule 1 (citing cases.)

* * *

“The parties to the contract now under consideration seem not to have expressed any intention whatever in regard to when the title in the new Cleveland sedan should vest in Jones. They say nothing about that matter in the conversation on the morning of October 8th, nor in any of the correspondence which passed between them. Jones agreed, in effect, that he would buy the new sedan and pay \$1875.00 for it, if and when the sales company sold his old car for \$1500.00 net to him, the proceeds of the sale to that amount to apply upon the price of the new car, and that he would pay the balance of \$375.00 when he took possession of the new car. Both parties understood and intended that the sales company should retain the right to the possession of the sedan until the entire purchase

price was paid. The company did sell the old car for more than the amount which Jones asked for it and received the money, so that Jones, as a result of that transaction, in fact paid \$1500.00 which is all that he claims in this action, toward the price of the new sedan. To all intents and purposes, the situation was then the same as if Jones had stepped into the sales company's office and handed over \$1500.00 in money as a part payment on the automobile, then on exhibition in the showroom, and said that he would return within a few days and pay the balance of \$375.00 and take the new car."

This decision was cited with approval in the later case of *Taylor v. Daynes*, 118 Utah 61, 218 P. 2d 1069. See also *Davis v. Semloh Hotel, Inc.*, 86 Utah 318, 44 P. 2d 689.

The evidence of a present sale and transfer of the ownership of title in this vehicle is even stronger than *Jones v. C. I. Trust*, supra, because in this situation there was no condition subsequent upon which the title to the automobile should pass, such as the sale of the purchaser's automobile, but rather, it was intended by the parties that ownership should pass to Child before Hardman paid Barrus for the pickup. The ownership of the pickup at the time of the accident is only germane to the question of whether there was any evidence to support the issue that Hardman had the right to control Child in the operation of the pickup, but

even if we assume that ownership had not passed to Child, his status would be that of a bailee or a prospective purchaser, which would not establish a presumption of or constitute evidence that he had the right to control the manner in which Child drove the truck.

There is a long line of Utah decisions holding that ownership raises no presumption of agency or control in the owner. *Galarowicz v. Ward*, 230 P. 2d 576, 119 Utah 611, reaffirms this principle and refers to earlier Utah decisions.

The fact that the owner of a car may benefit from the operation of a car by another, does not make the former the bailee's agent. *Conklin v. Walsh*, 113 Utah 276, 193 P. 2d 437.

The complaint alleges that Child was driving the truck as the agent or servant of Hardman, however, the issue of whether Child was a servant or employee was apparently abandoned by plaintiff, and the court did not submit the issue to the jury in his instructions. The test of whether the relationship of principal and agent exists is set out succinctly in *Fox v. Lavender*, 89 Utah 115, 56, P. 2d 1049, as follows:

“The test of whether one is the agent of the other depends upon the right of control of one over the other. The same principles of agency apply to the running of an automobile as apply to any other field of action.

The fact that the automobile is capable of causing so much damage has led the court, sometimes unwillingly, to depart from the fundamental principles of principal and agent in order to hold owners responsible, the thought in the minds of the court being that more responsibility should be visited upon the owner of such an instrument because of the potentialities of mischief."

* * * * *

"Many cases have loosely used such expressions such as 'for and on behalf' or 'in the business of,' or 'for the benefit of.' As stated before, the inquiry must be directed to the question of agency in the operation of the car rather than to the question of agency for the accomplishment of some ultimate purpose."

The same principle is discussed in *Dowsett v. Dowsett*, 116 Utah 12, 207 P. 2d 809:

"* * * 'An agent who is not subject to control as to the manner in which he performs the acts that constitute the execution of his agency is in a similar relation to the principal as to such conduct as one who agrees only to accomplish mere physical results. For the purpose of determining liability, they are both 'independent contractors' and do not cause the person for whom the enterprise is undertaken to be responsible * * *.'"

Hardman, not being in the pickup, could exercise no physical control over it and even if we adopt plaintiff's theory that he had an interest in having Child drive the truck to Sunset in order

that sales documents could be executed and arrangements be made for payment of the purchase price, such does not make Child his agent in the manner in which Child drove the truck. Before leaving Tooele Hardman suggested to Child that they pass each other occasionally (R. 32), a usual admonition between drivers on a trip so that if trouble develops one may assist the other. When they made a temporary stop after leaving Tooele Hardman gave Child no instructions either to stop or in driving the remainder of the trip to Sunset (R. 35).

If Child was a prospective purchaser, he was still acting in his own benefit, and the relationship between them was bailor and bailee. *31 A.L.R. 2d* 1455. Plaintiff may contend that the relationship between them was that of joint venture, however, the basis for that relationship is contractual and the use of the vehicle must be in furtherance of the business objective provided for in the contract. *Derrick v. Salt Lake & Ogden Ry. Co.*, 50 Utah 573, 168 P. 335, in which it was held that joint venture existed. Said the court:

“The contractual relations of plaintiff and his traveling companions were substantially the same as they would have been if they jointly hired an automobile with which to make the trip, with the understanding that they would jointly pay the expenses and mutually and concurrently direct the journey and the details thereof. The trip was therefore

a joint enterprise in which these parties had a community of interest and in which they all equally had a voice and a right to be heard respecting the details of the journey. Under these circumstances the negligence of Merritt in the management of the automobile at the time of the collision was imputed to plaintiff."

There was no evidence of such an arrangement between Hardman and Child. See also the case of *Foxley v. Gallagher*, 55 Utah 289, 185 P. 77.

The principles of law applicable were further elaborated upon in the case of *Fox v. Lavender*, supra, which involved an action brought against a wife riding in an automobile owned by the husband and wife for injuries arising out of an accident which occurred while the automobile was being driven by the husband on an errand for the wife. Even under those facts the court held that they were not engaged in a joint venture. The fact that the wife was a joint owner and had a common destination, did not in and of itself make it a joint venture."

The fact that Child and Hardman were not in joint possession of the automobile at the time of the accident is important in determining whether Hardman had the right to control the vehicle. Judge Wolfe in the *Fox vs. Lavender* opinion makes some

further interesting comments on the law of joint venture. He quotes from *Coleman vs. Bent*, 100 Conn. 527, 124 Atl. 224:

“What sort of an arrangement will make the parties to it joint adventurers in the operation of a vehicle in which all are riding is well settled. A typical case is where two or more jointly hire a vehicle for their common purpose and agree that one of their number shall drive it. In such a case the possession of the vehicle is joint and each has an equal right to control its operation. The better considered cases hold that such common possession and common right of control, resulting in common responsibility for negligent failure to control are the earmarks of the legal relation of a joint adventure in the operation of a vehicle.”

The *Restatement of the Law of Torts*, Vol. 2, Sec. 491, states the effect of joint enterprise on contributory negligence as follows:

“Any one of several persons engaged in an enterprise is barred from recovery against a negligent defendant by the contributory negligence of any other of them if the enterprise is so far joint that each member of the group is responsible to the third person injured by the negligence of fellow members.”

Could it be contended reasonably that if the defendant Hardman had collided with the automobile in which the plaintiff was riding, that the defendant Child would have joint liability with Hardman

for the operation of the latter's vehicle? The situation as shown by the evidence seems to compel a negative answer.

The transaction between Hardman and Child was complete before they left Tooele. The only further interest Hardman had in the matter was to obtain his money from Child when they reached Sunset. He did not attempt to control Child in the operation of the vehicle, nor did he have any right to do so.

POINT II.

THE COURT ERRED IN ITS INSTRUCTIONS ON THE LAW AND BY FAILING TO SUBMIT TO THE JURY THE DEFENDANT HARDMAN'S THEORY OF THE CASE.

The court's specific instructions which the defendant Hardman believes are erroneous are set out as follows:

"Instruction No. 10

"This is an action by Ida M. Johnson, administratrix of the estate of C. Tennyson Johnson, deceased, to recover on behalf of herself as the widow, and Don Allen Johnson, a son of deceased, damages for the death of the deceased C. Tennyson Johnson, the husband and father of the above mentioned persons.

"In her complaint plaintiff alleges that that on the 20th day of December, 1954, C. Tennyson Johnson was a passenger in an automobile being driven by George W. Wil-

liams in a westerly direction on U. S. Highway No. 40, approximately eight miles west of the limits of Salt Lake City; she alleges that defendant Child as agent of defendant Hardman was driving a pickup truck in an easterly direction on said highway; she alleges that said defendant negligently drove said truck at an excessive speed on the left side of the highway at a time when the highway was not free of oncoming traffic and such negligence proximately caused the death of C. Tennyson Johnson; plaintiff alleges that the death of said C. Tennyson Johnson has caused his widow and child general damages in the sum of \$75,000.00 and funeral and burial expenses in the sum of \$828.23.

“Defendants in their answers deny that they were negligent and deny that the widow and children of C. Tennyson Johnson have been damaged, as a result thereof.

“The foregoing is not to be taken by you as a statement of the evidence introduced in this case but it is merely a statement of the contentions of the parties as disclosed by their pleadings.”

“Instruction No. 12

“You are instructed that under the laws of this state, ownership interest in personal property passes at the time the parties to the contract intended for it to be transferred; and unless a different intention appears from the evidence, ownership passes to a purchaser when the contract of purchase is completely agreed upon. Unless the seller gives credit to the purchaser, the purchaser is not entitled to

the possession of personal property until he tenders payment therefor.

“If you find from the evidence that at Tooele, Utah, the defendant Child, after an inspection of the truck at the Barrus Motor Company’s place of business, expressed his satisfaction with it and said he would buy it and pay therefor six hundred and fifty dollars plus the trade in value of his Ford automobile, five hundred dollars of which he was to pay when the parties returned from Tooele to Sunset, Davis County, Utah, and the balance of one hundred and fifty dollars at a later date; and if you further find that defendant Hardman paid Barrus Motor Company of Tooele for the truck and delivered the same to Child pursuant to said agreement without an intention to retain any further interest in said truck, then you are instructed that at the time of the accident defendant Child and not defendant Hardman was the owner of the truck, and Hardman was not responsible for its operation on the way to Sunset, Utah.”

“Instruction No. 13

“You are further instructed that if you find from a preponderance of the evidence that the defendant Hardman and the defendant Child had not entered into completed agreement embracing all the terms of how the truck was to be finally paid for and that the defendant Hardman did not intend to relinquish absolutely all of his interest in and to the pick-up truck, then I instruct you that title to said truck had not finally passed to defendant Child and would

be in the defendant Hardman. You are further instructed that if the defendant Hardman requested the defendant Child to drive said pick-up truck to Sunset, Utah, where the contract would be finally determined, then and in that event the defendant Hardman would be responsible for the manner in which the defendant Child drove the truck between Tooele and Sunset, Utah."

We appreciate that Instruction No. 10 purports to set out the contentions of the parties, however, it does not do so in that it omits the denial of Hardman that Child was his agent. Neither Instruction 12 nor 13, which deal with the relationship between them, mention the issue of agency. Both of these latter instructions tell the jury in substance that if they found that Hardman intended to retain any interest in the truck, that ownership in the same did not pass to Child.

In none of the instructions was the jury informed that Hardman denied that Child was his agent or that he was responsible for the manner in which Child drove the truck. From all that appears in the instructions, the jury could and undoubtedly did assume that as the details of the transaction were not completed in all respects, including every detail, Hardman was responsible for Child's conduct.

In no instruction was the jury told that for the negligence of Child to be imputed to Hardman the latter must have the right to control the manner in

which the truck was driven. The word "control" is not mentioned anywhere in the instructions.

Reading the instructions in their entirety, as we must do, compels the conclusion that Hardman's theory of defense was not submitted to the jury, which was prejudicial error. It was the duty of the trial court to cover the theory of all parties in the instructions. *Startin v. Madsen*, 120 Utah 631, 237 P. 2d 834. Exceptions covering the foregoing were taken by the defendant Hardman (R. 219-222).

Instruction No. 12 incorrectly states the law in that the jury is told that ownership in personal property does not pass unless the contract of purchase is "completely" agreed upon, which is contra to Sections 60-2-2 and 60-2-3, *Utah Code Annotated 1953*. Section 60-2-3, Rule (1), for ascertaining the intentions of the parties, provides:

"Rule (1) Where there is an unconditional contract to sell specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, is postponed."

A jury of laymen would undoubtedly interpret the word "completely" to mean that in order for ownership to be transferred the payment, including the terms, would have to be discussed and agreed

upon between the parties down to the minute details. The evidence was undisputed that the purchase price was \$650.00 plus Child's old car.

In paragraph three of the instruction the jury was told that in order to absolve Hardman from responsibility for Child's operation of the truck they must find that Hardman delivered the same to Child without "an intention to retain any further interest in said truck." It is submitted that even if Hardman had intended to retain a seller's lien for the unpaid balance of the purchase price, such would not prevent the property interest from passing to Child subject to the lien. What type of "interest" does the court refer to? These men were friends. Certainly Hardman had a friendly interest in Child's reaching his destination with the truck. Under this instruction the jury may have concluded that such an interest was sufficient to make Hardman liable for Child's conduct. Exceptions were taken to this instruction (R. 220).

Instruction No. 13 again tells a jury that if they find that "defendants Hardman and Child had not entered into a completed agreement embracing all of the terms of how the truck was to be finally paid for and that the defendant Hardman did not intend to relinquish absolutely all of his interest in and to the pickup truck", title had not finally passed to defendant Child and would be in the defendant

Hardman. This part of the instruction reiterates and re-emphasizes the statement in Instruction No. 12 that there must be a "completed agreement" (the word "completely" is used in No. 12) and reiterates in positive terms that if Hardman did not intend to relinquish "absolutely" all of his interest in the truck, title to the vehicle did not pass to Child. This instruction is susceptible to the same objections as No. 12 in that it is contra to the law as provided in Sections 60-2-2 and 60-2-3 *Utah Code Annotated 1953*.

The two instructions tend to over emphasize plaintiff's theory that ownership had not passed to Child. The use of the word "absolutely" makes it extremely improbable, if not impossible, for a jury to find for the defendant Hardman on this issue.

The last sentence of Instruction No. 13 is erroneous as it makes Hardman responsible for Child's negligence if the jury finds he was the owner of the truck, which is contra to the established principle of law that the negligence of a bailee is not imputable to a bailor.

It seems to us that Instructions No. 10, 12 and 13, and particularly the sense in which the words "completed", "completely", and "absolutely" are used in the latter two instructions virtually directs the jury to find that ownership in the truck had not

passed to Child and that because of that fact alone Hardman is liable for Child's negligence.

If these instructions correctly state the law, relationship of principal and agent is created between every person who sells a car under a Conditional Sales Contract and the buyer. It is common practice for a purchaser to drive a car with the dealer's "stickers" until he receives a Certificate of Title from the State Motor Vehicle Department. Defendant Hardman's exceptions to Instructions No. 12 and 13 are found on pages 220-223 of the Record.

CONCLUSION

We respectfully submit that the evidence establishes as a matter of law that Child was not Hardman's agent in the manner in which he drove the pickup truck, and the verdict should be set aside and a judgment of no cause of action entered in favor of the defendant Hardman or, in the alternative, he should be granted a new trial because of prejudicial error in the court's instructions.

Respectfully submitted,

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